Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 77-1836

THOMAS TIDMORE,

Petitioner

VS

CITY OF BIRMINGHAM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, Thomas Tidmore, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Court of Criminal Appeals rendered on December 20, 1977, which judgment affirmed the conviction of Thomas Tidmore for the crime of unlawfully exhibiting an alleged obscene motion picture film.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals is not yet officially reported.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on December 20, 1977 and appears in the Appendix hereto.

A timely application for rehearing was denied on January 24, 1978 without opinion.

A petition for a writ of certiorari was timely filed in the Supreme Court of Alabama and denied on March 24, 1978 without opinion.

The statutory provision believed to confer jurisdiction upon this court to review the judgment of the Alabama Court of Criminal Appeals is 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether defendant was denied Fourth Amendment protections from an unconstitutional search and seizure.

2. Whether defendant was denied Sixth Amendment providing for a speedy trial by an impartial jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Annotated, Title 28:

§1257 State courts; appeal; certiorari
Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States.

STATEMENT OF THE CASE

On January 15, 1976 a police officer for the City of Birmingham entered a theatre managed by the defendant. He viewed the allegedly obscene motion picture being exhibited there.

On January 17, 1976 that police officer executed a form affidavit for a search warrant. A search warrant accompanies the affidavit on the same form. The text of both the affidavit and the search warrant appear in the Appendix at page A8.

The film was seized pursuant to the warrant January 20, 1976 and defendant was arrested and charged with the violation of the City of Birmingham's "obscenity ordinance" January 27, 1976. Until the time of the seizure of the film and the defendant's later arrest no law enforcement official, magistrate or judge had viewed the film. Defendant was tried in the Recorders Court for the City of Birmingham wherein there is no provision for jury trial on February 4, 1976.

Defendant was not afforded a jury trial until February 22, 1977.

At the jury trial on February 22, 1977 prospective jurors were asked the following question on voir dire examination:

> "If, during the course of the trial of this case, the evidence shows that Thomas Tidmore (defendant) showed or caused to be shown in the City of Birmingham a movie which depicted acts of sexual intercourse including cunnilingus, fellatio, homosexuality and bi-sexuality, would you merely because of that be prejudiced against him?"

Five of the prospective jurors responded in the affirmative.

Two of those jurors were also asked the following question:

> "Knowing what you know about the case and realizing that if you are chosen to serve as a juror it would be necessary probably for you to serve on a mixed jury, do you believe you would be able if required to do so to sit as a juror in this case and give the defendant, Thomas Tidmore, an unbiased and an unprejudiced opportunity to present his defense or would that fact embarrass you to such an extent you would not be able to maintain impartiality?"

One of those jurors responded "I would be biased."

The trial court addressed the prospective jurors as follows:

THE COURT: I am going to – Grace, Keith, you were asked would you be prejudiced against the defendant if the evidence showed he had shown a movie with certain – concerning certain acts. In this case the defendant is charged with showing an obscene movie. Whether it is obscene or not obscene is for you to decide but more importantly, the Court will give you certain criteria which the Supreme Court of the United States has stated is the law.

I will give you certain criteria and set forth before you the various factors which our appellate courts have said now is obscenity.

It is not based on what you individually think. It is based on what the law is and I will give you the law which the appellate courts have stated is the law by which you decide whether something is obscene.

The criteria is not whether you are embarrassed over it and the criteria is can you listen to the evidence and then be guided by what the Court says – and this is important - - what the Court says to you are the criteria that go to make up an obscene film, paper, magazine, book or anything.

Can you impartially listen to that – take that law and view this film all based on the law which the highest court in this land says is the law?

That is the criteria, so those people, one, two, three, four, five people who asked, were asked about prejudice, were you prejudiced against the defendant, the criteria is what does that film – what does the – well, whether or not that film is obscene based on what the appellate court says. That is what the law judges it on. If you cannot judge it on that basis, then, of course, you should not serve on this jury because everybody is interested, including the Court, in impartial thinking but you have to be guided by the law and when you take a position as a juror in this case you must be guided by the law and it is your duty and your sole duty to be guided by what the law is, not what you individually think.

Mrs. Grace, could you do that?

THE JUROR: Yes, you gave us a better – informed us better.

THE COURT: Of course, this is new to you all. I understand that. I really understand your dilemna and appreciate it. And Mrs. Keith, could you do that? But I want you to simply answer if you could be guided by the law. I want you to be very candid, now.

THE JUROR: I can.

THE COURT: Pardon me.

THE JUROR: Yes, sir, I can follow the law.

THE COURT: Mr. Crabtree?

THE JUROR: Yes, sir.

THE COURT: Mrs. McLaughlin? She nodded yes.

Mrs. Keith and Mrs. McLaughlin, you also said of course you would be embarrassed. That is understandable, too, and as I said before, the jury -- serving on a jury frequently does lead to embarrassment, I don't mean just pictures like this or cases like this. I mean lots of times we have things that are upsetting, damage suits, personal injury – it frequently happens like that. But the most important thing is if you think having -- being on -- of course, this jury in all probability will be male and female, all adults apparently, but if either of you two ladies think you would be biased or embarrassed and could not give a verdict based on the law given you, this is the time to say it and everybody will appreciate your being candid about the matter if you feel that way.

A JUROR: It goes against the Christian principles of our church.

THE COURT: All right, Mrs. McLaughlin. We'll just note that. She can remain there. She is an extra. I will eliminate her now.

MR. MACMAHON: I beg your pardon, Your Honor?

THE COURT: That is Mrs. Edna McLaughlin, 82.

MR. MACMAHON: I didn't understand you.

THE COURT: I am going to eliminate her. Mrs. Keith, what is your situation?

THE JUROR: I can make it.

THE COURT: She said she can make it, is that right? All right, proceed.

The questions of the legality of the search and seizure and the inordinate delay in providing defendant with a jury trial were raised by motions to dismiss, to suppress and to quash the search warrant, each of said motions filed in open court on February 22, 1977.

On appeal these same questions were urged in the Alabama Court of Criminal Appeals and later in defendant's petition for certiorari in the Supreme Court of Alabama. Defendant's contentions in those regards were rejected as is indicated in the opinion of the Alabama Court of Criminal Appeals in the Appendix. No other opinion has been rendered by any Court.

In the appeal to the Alabama Court of Criminal Appeals, application for rehearing there and the petition for certiorari in the Supreme Court these issues were all urged upon the Court.

In the opinion of the Alabama Court of Criminal Appeals it can be seen that the court misapplied the law and the constitutional provisions. The question of the prejudice of prospective jurors is dealt with on the basis of state law dealing with indications of a fixed opinion as to the *guilt or innocence* of the accused rather than the effect on their qualifications to serve of the indicated prejudice against the defendant based upon the facts and circumstances of the case. The issue of the lack of a speedy trial is dealt with as well on the basis of state law without regard to this court's pronouncements in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101; *Strunk v. U.S.*, 412 U.S. 434, 93S. Ct. 2260, 37 L. Ed. 2d 56; and *Moore v. Arizona*, 414 U.S. 25, 94 S. Ct. 188, 38 L. Ed. 2d 183.

In fact, the Alabama Court of Criminal Appeals applied the "demand-waiver" rule to the defendant.

The court also failed to meet the contention that the search warrant was unconstitutional or that the procedure resulting in its issuance failed to take account of constitutional protections provided in the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

This court should vindicate its long line of precedent regarding required procedures in the prosecution of allegedly obscene matter so as to guarantee to the defendants the full spectrum of protections articulated in the Fourth and Sixth Amendment's to the Constitution.

In order to comport with constitutional safeguards any system of prior restraint must operate under judicial superintendence and assure an almost immediate

judicial determination of the validity of the restraint and must be incorporated within a procedural framework designed to focus searchingly upon the issue of obscenity. *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584; *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 834, 13 L. Ed. 2d 649; *Lee Art Theatre, inc. v. Virginia*, 392 U.S. 636, 88 S. Ct. 2103, 20 L. Ed. 2d 1313.

At no time in the procedure prior to the imposition of final restraint was there a stage at which attention was focused searchingly on the issue of obscenity.

The question of prejudice and bias is not equivalent to a fixed opinion as to the guilt or innocence of an accused. Both facts would preclude the selection of an "impartial jury". No rehabilitation on the part of the trial court can remove the effect of bias or prejudices against an individual defendant.

Alabama state law provides that in criminal trials great care should be exercised to preserve to accused his constitutional right to a fair trial by an impartial jury. In such cases the court should resolve any doubt as to the competency of a jury in favor of the defendant, *Wilson v. State*, 243 Al 1; 8 So. 2d 422; see also *Leach v. State*, 31 Al App 390; 18 So. 2d 285.

The Sixth Amendment requires impartiality of jurors and admittedly prejudiced or biased jurors are not competent to serve.

In *Barker v. Wingo*, 407 U.S. 514; 92 S. Ct. 2182; 33 L. Ed. 2d 101, this court emasculated the "demand-waiver" doctrine with respect to defendant's right to a speedy trial. All of the considerations which abide criminal cases in general must on the basis of *Bantam Books v. Sullivan, supra, Lee Art Theatre, Inc. v. Virginia, supra,* and *Freedman v. Maryland, supra,* be especially regarded. The failure to provide a speedy trial in an "obscenity case" is tantamount to the complete abnegation of the First Amendment right of freedom of speech.

CONCLUSION

It is submitted that the writ should issue to protect the substantial constitutional rights and to circumscribe local procedures so as to vindicate those rights.

Respectfully submitted,

James W. May
Odom, May & DeBuys
620 North 22nd Street
Birmingham, Alabama 35203

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, James W. May, attorney for Thomas Tidmore, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of June, 1978, I served three copies of the foregoing Petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals on the City of Birmingham as follows:

By mailing in the United States mail three copies of same in a duly addressed envelope with first class postage prepaid to Watts Davis, City Attorney for the City of Birmingham, City Hall, Birmingham, Alabama 35203.

James W. May
Odom, May & DeBuys
620 North 22nd Street
Birmingham, Alabama 35203

APPENDIX

A1

Thomas TIDMORE

v.

THE CITY OF BIRMINGHAM.

6 Div. 484

The Alabama Court of Criminal Appeals

October Term, 1977-78

Appeal from Jefferson Circuit Court

BOWEN, Judge.

The appellant was convicted by a jury in the Circuit Court of Jefferson County for a violation of Section 16-18 of the General Code of the City of Birmingham 1964, as amended, making it unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with the requisite intent any obscene matter. In this instance the obscene matter was a movie entitled *Illusions of Love*. The appellant was the manager of the Centennial Cinema in Birmingham, Alabama, where the movie was being shown.

On appeal the sufficiency of the evidence is not challenged. Nor does the appellant take issue with the jury's finding that the film was indeed obscene and pornographic. In light of such we will forego any discussion of the nauseating contents of the film and the facts resulting in the conviction of the appeallant.

I

Initially the appellant contends that Section 16-18 of the General Code of the City of Birmingham 1964, as amended, is unconstitutional. Birmingham City Ordinance Number 67-2 was codified without change and became Section 16-18 on January 9, 1976. We have previously held that this particular section is constitutional. *McKinney v. City of Birmingham*, 52 Ala. App. 605, 296 So. 2d 197, cert. denied, 292 Ala. 726, 296 So. 2d 202 (1973); *Robinson v. State*, 6 Div. 363, (Ala. Cr. App., Ms. October 1, 1977). The constitutionality of a similar ordinance of the City of Montgomery was confirmed in *Gilbert v. City of Montgomery*, Ala. Cr. App. 337 So. 2d 140 (1976). Under these authorities this contention advanced by the appellant is without merit.

II.

The appellant asserts that he was not afforded a speedy trial contrary to the Sixth Amendment of the Constitution of the United States.

The appellant was arrested on January 27, 1976, and was adjudged guilty in the Recorder's Court of the City of Birmingham. On February 11th, he posted an appeal bond and demanded a jury trial. The appeal was docketed by the circuit clerk on April 22, 1976, and trial was first scheduled for June 21, 1976. The case was rescheduled on three different dates and came to be heard on February 22, 1977. From the record it appears that the trial was reset because other "movie cases" were tried during this time and ultimately due to the congestion of obscenity cases on the trial court's docket. The presiding judge for the Circuit Court of Jefferson County explained:

> "The City appeals docket is set one week a month. It is the policy of this Court on pornograph -- as a matter of fact, anything else – we will only try one pornograph per month because we have got the jury, in our judgment, we got the jury tainted, having seen one pornographic movie, we don't want to try another one because then we've got trouble getting jurors."

The record reveals no request for or objection to any continuance by either the city or the defense. The appellant never requested a speedy trial. A motion to dismiss filed by the appellant on February 22, 1977, the date of trial, attempted to raise the question of the failure to afford the appellant a speedy trial.

A defendant is not entitled to raise an issue as to a denial of a speedy trial absent an attempt, prior to the trial date, to bring to the attention of the court the alleged denial of a speedy trial. *Hodges v. State*, 48 Ala. App. 217, 263 So. 2d 518 (1972). The appellant did not make a prima facie case for release on grounds of the denial of a speedy trial and has not even alleged that any actual prejudice resulted from the fact that trial was delayed. *Sellers v. State*, 48 Ala. App. 178, 263 So. 2d 156 (1972). A defendant who makes no outcry when there was a delay in his trial is deemed to have waived his right to a speedy trial. *Autrey v. State*, 44 Ala. App. 53, 202 So. 2d 88, cert. denied, 88 S. Ct. 1422, 390 U.S. 1030, 20 L. Ed. 2d 287 (1967); *Broadnax v. State*, 54 Ala. App. 546, 310 So. 2d 265 (1975). It is fundamental that an accused must affirmatively exercise his right to a speedy trial. *Mayberry v. State*, 51 Ala. App. 343, 285 So. 2d 507, cert. denied, 291 Ala. 792, 285 So. 2d 512, cert. denied, 94 S. Ct. 1438, 415 U.S. 929, 39 L. Ed. 2d 486 (1972). Since there was

no effort on part of the appellant to secure his right to a speedy trial prior to the day of the trial, he may not complain of any delay on appeal. *Harmon v. State*, 48 Ala. App. 521, 266 So. 2d 325, cert. denied, 289 Ala. 744, 266 So. 2d 328 (1972); *Moulden v. State*, 47 Ala. App. 573, 258 So. 2d 915 (1972).

III

The appellant contends that he was denied the effective use of his preemptory challenges because the trial court did not excuse four jurors for cause.

On voir dire examination of the jury panel, defense counsel asked the following question.

> "If during the course of the trial of this case the evidence show that Tom Tidmore showed or caused to be shown in the City of Birmingham a movie which depicted acts of sexual intercourse including cunnilingus, fellatio, homosexuality and bisexuality, would you merely because of that be prejudiced against him?"

Five jurors responded: Mr. Crabtree, Mr. Parker, Mrs. McLaughlin, Mrs. Keith and Mrs. Grace. The trial judge then instructed the jury on its duties, responsibilities and that the jury must decide whether or not the film was obscene based on certain criteria under the law and upon which the jury would be instructed.

Juror Grace then responded that she could be guided by the law, as did Jurors Keith and Crabtree. Juror McLaughlin was excused by the court. Subsequently defense counsel requested that Jurors Crabtree, Grace, Keith, and Parker be excused for cause. The court then overruled this request with the following comment.

> "My recollection of when I explained to them, namely the charge and the fact that not their personal evaluation is involved, and as we all know, it is contemporary community standards. I think each of them individually answered they would base it on the law in the case and the evidence in the case so I am going to overrule it."

The City then asked a few questions of the jurors whereupon the trial court, in an abundance of caution, again inquired of the jurors

> "I think I am going to ask a question to make sure I understand correctly. I think I do but to make sure, Mrs. Grace, Mrs. Keith, Mr. Parker, Mr. Crabtree, this may be a duplication but I want to make sure that I am correct.
>
> "In answer to the question that you would be prejudiced – would anyone be prejudiced against the defendant because they showed a certain picture with certain acts, then I explained the law and what the proof had to be and particularly I have emphasized that you must be guided by the law and I want you all to be very candid about it, that is really what we are here for, and we want to make very sure everyone is as impartial as is humanly possible for people to be, realizing we are all people. Are you sure, Mrs. Grace, you wouldn't be – understanding the law and seeing this picture, do you – are you sure that you would not be prejudiced against the defendant but would base it solely on the –
>
> "THE JUROR: Right, after your explanation.
>
> "THE COURT: Mrs. Keith?

"THE JUROR: I could do it with the law. I could do it.

"THE COURT: Mr. Parker?

"THE JUROR: Applying the federal law to it?

"THE COURT: Yes, it is really Alabama law, too. I used the United States Supreme Court because that is where over the years case after case has come out of, but this is Alabama law, in fact, right now as far as I know. It changes frequently.

Mr. Crabtree?

"THE JUROR: Yes, sir, I think I could.

"THE COURT: All right, I will overrule the motion again."

The action of the trial court in overruling the motion to excuse the jurors for cause was proper. The principles of law involved are clear and are concisely set forth under 50 C.J.S. 998-999, Juries, §242.

> "A juror is incompetent who has such personal opinions with respect to the subject matter of the suit, or conscientious scruples on any subject, as would influence his verdict, . . . , or who has a fixed opinion as to any of the main issues involved.
>
> ***
>
> "In general the same test which determines whether a juror's opinions as to the guilt or innocence of accused disqualifies him, . . . , is applied to determine whether a juror's scruples will disqualify him; that is, can he eliminate the influence of his scruples and render a verdict according to the evidence? Ordinarily he is not disqualified where it appears that he is entirely willing to accept the law as laid down by the court and able to decide the case impartially according to the evidence. The determination of this question is based on the juror's answers and demeanor and is within sound discretion of the trial judge."

Thus, where jurors testify that they have opinions but that they would try the case fairly and impartially according to the law and the evidence, and that their opinions would not influence their verdict, those jurors are competent to serve. *Godau v. State,* 179 Ala. 27, 60 So. 908 (1913); *Strickland v. State,* 151 Ala. 31, 44 So. 90 (1907); *Huddleston v. State,* 37 Ala. App. 57, 64 So. 2d 90, cert, denied, 258 Ala. 579, 64 So. 2d 102 (1953). To disqualify a prospective juror, he must have more than a bias, or fixed opinion, as to the guilt or innocence of the accused. Such opinion must be so fixed as that it would bias the verdict a juror would be required to render. *McCorvey v. State,* Ala. Cr. App. 339 So. 2d 1053, cert. denied, 339 So. 2d 1058 (1976); *Hammil v. State,* 90 Ala. 37 (1890).

We have carefully reviewed the entire record as is required by law and it is our opinion that the judgment of the trial court is due to be and is hereby

AFFIRMED.

All Judges concur.

FOR USE IN DAYTIME OR NIGHTTIME

STATE OF ALABAMA)

In the Recorders Court of the City of Birmingham, Alabama

JEFFERSON COUNTY)

Personally appeared David Luker hereinafter called Affiant, who, being duly examined by the undersigned authority upon his oath, deposes and says as follows:

Affiant upon his oath deposes and says that the personal property hereinafter described was (1) stolen or embezzled or (2) used as a means of committing a felony

(Described property) An offense against the ordinance of the City of Birmingham, to-wit: City Ordinance 67-2 exhibiting or displaying obscene material to-wit: a motion picture film entitled "Illusions of Love", a more particular description of which is not obtainable by affiant, and that (Name or Described person) John Doe, alias Thomas Tidmore whose name or description is otherwise unknown to affiant, is guilty thereof, and that said property is located or situated as follows: (Describe Place to be Searched) Centennial Cinema, 2500 7th Avenue South, a better description of which location or premises is unknown to affiant and that the facts tending to establish the foregoing ground for the issuance of a search warrant are as follows: (Set Out Facts Tending to Establish Ground for Issuance of Warrant) On to-wit: 15 Jan 76 affiant viewed a sound and color presentation entitled "Illusions of Love" at 1:00 PM. The film showed males and females engaged in actual sexual intercourse, fellation, cunnilingus, masturbation and homosexual acts among females. Also were presented scenes showing the male organ in an erect state ejaculating openly in or

near the mouth of female actors. These scenes were presented with cameras showing close-ups of the genitals of the actors.

David Luker

Sworn to and subscribed before me, this 17th day of January, 1976.

City Magistrate of the City of Birmingham

THIS WARRANT IS POSITIVE AND MAY BE EXECUTED AT ANY TIME OF THE DAY OR NIGHT AND MUST BE SUPPORTED BY A POSITIVE AFFIDAVIT.

SEARCH WARRANT

STATE OF ALABAMA)

In the Recorders Court of the City of Birmingham, Alabama

JEFFERSON COUNTY)

To the Chief of Police or any Police Officer of the City of Birmingham, Alabama:

Proof by affidavit having this day been made before me by David Luker that (Set Out Grounds for Issuance of Warrant) a motion picture film entitled "Illusions of Love" is or was as described above and is presently being shown at Centennial Cinema, you are therefore, commanded at any time in the day or night to make immediate search of (Describe Place to be Searched) Centennial Cinema at 2500 7th Avenue South, Birmingham, Alabama for the following property (Describe Property) a sound and color film entitled

"Illusions of Love", and if you find the same or any part thereof to bring it forthwith before the Recorder of the City of Birmingham, Alabama at City Hall of said City.

This the 17th day of January, 1976.

City Magistrate of the City of Birmingham

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1978

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Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

MOTION

To Deny Writ of Certiorari to Review the Opinion and Judgment of the Alabama Court of Criminal Appeals

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1836

THOMAS TIDMORE,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

MOTION

To Deny Writ of Certiorari to Review the Opinion and Judgment of the Alabama Court of Criminal Appeals

The Respondent respectfully prays that the Writ of Certiorari be denied to review the opinion and judgment of the Alabama Court of Criminal Appeals entered against the Petitioner on December 20, 1977.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals is cited at Ala. Cr. App., 356 So.2d 231. It is appended to the Petitioner's Arguments and filed in this Honorable Court marked, Appendix A 1-7. It is correct with the exception of the misspelling of the word Appellant, the last word in the last paragraph on page A 1. No reversible error or errors were committed by the trial court.

JURISDICTION

This Court's jurisdiction *may* be invoked under Title 28 U.S.C.A. § 1257. (Emphasis added)

The following portion of United States Supreme Court Rule 19 is material to the pending case. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The issues raised by the Petitioner do *not* in the opinion of the writer present new questions for the first time nor present any special or important reasons for granting a writ of certiorari and is not a case of first impression. (Emphasis added) The following quotation is applicable in view of the fact that no new question is being presented for the first time:

> "A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is a 'case of first impression.' People v. Pestronk, 157 N.Y.S. 2d 492, 493, 3 Misc.2d 845."

QUESTIONS PRESENTED

1. Was the property in the Petitioner's possession the subject of an unreasonable search and seizure which resulted in violation of his rights under the Fourth Amendment to the United States Constitution?

2. Did Petitioner receive a speedy trial pursuant to the Sixth Amendment to the United States Constitution?

3. Was Petitioner tried by an impartial jury pursuant to the Sixth Amendment to the United States Constitution?

STATEMENT OF THE CASE

The Petitioner was charged and convicted of violating Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended.

> "It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the city or the police jurisdiction thereof, any obscene matter."

In the obscene motion film entitled "Illusions of Love" the jury assessed a fine of $300.00 and the Court imposed 150 days hard labor to be performed by the Petitioner for the City of Birmingham.

Motions to Dismiss the Complaint, Suppress the Evidence and Quash the Search Warrant were properly overruled by the trial court.

Motions referred to in this brief and argument will be prefixed by an "M" and transcript of the jury trial by a "T".

REASONS FOR DENYING THE WRIT

No new substantial constitutional question is presented.

No unreasonable search and seizure of property in the Petitioner's possession is supported by the evidence.

In *Heller v. New York*, 93 S.Ct. 2789 (1973), the Court stated:

> "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party the seizure is constitutionally permissible."

Since the law was complied with by the City of Birmingham the Petitioner's Motion to Quash the Evidence was properly overruled.

The affidavit in the search warrant did *not* contain conclusory assertions of Officer David Luker, and the magistrate did focus searchingly on the issue of obscenity *vel non* (T.p.105). (Emphasis added)

A search warrant may be issued only on probable cause supported by affidavits made before the issuing authority, name or describing the person under suspicion and particularly describing the property to be searched for and the place to be searched.

> Section 15-5-3, Code of Alabama 1975;
> Section 28-4-254, Code of Alabama 1975;
> *Bull v. Armstrong*, 48 So.2d 467, 254 Ala. 390.

In this case before this Honorable Court the Code sections and case law have been complied with by the City of Birmingham. (T. pages 105 and 106)

BANTAM BOOKS, FREEDMAN, LEE ART, are cited by the Petitioner on pages 10 and 11 of his petition. I assume he is alleging that the search warrants were issued based on the conclusory assertion of a police officer and the magistrate did not focus searchingly on the question of obscenity. The factual issues in those citations are *not* relevant to this pending case. (Emphasis added) He has failed to set forth the specific facts which resulted in the alleged unreasonable search and seizure.

In BANTAM BOOKS the Supreme Court of the United States of America declared the Rhode Island law creating a Commission to Encourage Morality in Youth unconstitutional. Those facts are inapplicable to the case at bar.

The FREEDMAN case held that a motion pictture censoring statute failed to provide adequate safeguards against undue inhibition of protected expression and was thereby unconstitutional. This is obviously also inapplicable to the facts in relation to the case at bar.

Finally, in LEE ART (1968 case) the Court went so far as to suggest that it was an open question whether a judge need view the motion picture before issuing the warrant. In *Heller v. New York* (1973 case), previously cited on page four of this brief, this issue was resolved as follows:

> "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party the seizure is constitutionally permissible."

The Petitioner, Thomas Tidmore, was afforded a speedy trial. There is nothing on the Trial Docket (T. pages 98 and 99) indicating Thomas Tidmore ever made a Motion for a Speedy Trial nor a Motion to Dismiss for the Lack of a Speedy

Trial *prior to February 22, 1977 (date of trial)* (T. page 92). (Emphasis added) He therefore failed to preserve said right. The Court (M. pages 42-44) set forth all the details which were involved and also a portion of the basis of the continuance is also reflected on the Trial Docket (T. pages 98 and 99).

In order to preserve a right to a speedy trial, it must be affirmatively shown by a defendant that demand for trial was made, and objection to postponement was made, or some other effort was made to secure a trial. U.S.C.A. Const. Amend. 5, 6, 14.

Robinson v. State, 248 So.2d 583, 46 Ala. App. 684.

The Petitioner cites *Barker v. Wingo*, 407 U.S. 514. In that case there was more than a five (5) year delay between the arrest and trial of the defendant. His first complaint was 3½ years after he was arrested. The Court ruled that the defendant was *not* seriously prejudiced by the delay. (Emphasis added)

In the case at bar, the Petitioner was arrested on January 27, 1976 and tried on February 22, 1977. *Less* than one year's delay was involved. (Emphasis added)

The Court in the BARKER case set forth the criteria regarding a speedy trial:

Length of and the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. It is determined on *ad hoc* basis in which the conduct of the prosecution and that of the defendant are weighed.

Petitioner further cites *Strunk v. U.S.*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56. In *Moore v. Arizona*, 94 S.Ct. 188 at the bottom of page 190 it refers to *Strunk* and states that no court shall overlook the possible impact pending charges might have on his prospects for parole and meaningful rehabilitation. *Neither of these facts are involved in the pending case.* (Emphasis added)

Reference is made to *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 by Petitioner. This case involved the State of Arizona extraditing the defendant from the State of California or dropping the detainer against him. *Neither extradition nor a detainer are involved in the pending case.* (Emphasis added)

Honorable William H. Cole the trial judge explained the delay in the trial of the Petitioner as follows:

> "The City appeals docket is set one week a month. It is the policy of this Court on pornograph—as a matter of fact, anything else—we will only try one pornograph per month because then we have got the jury, in our judgment, we got the jury tainted, having seen one pornographic movie, we don't want to try another one because then we've got trouble getting jurors." (T. p. 3 Q)

The record reveals no request for or objection to any continuance by either the City or the defense. The Petitioner never requested a speedy trial. A Motion to Dismiss was filed by the Petitioner on February 22, 1977, (the date of trial) it attempted to raise the question of the failure to afford the Petitioner a speedy trial.

A Defendant is not entitled to raise an issue as to a denial of a speedy trial absent an attempt, prior to the trial date, to bring to the attention of the court the alleged denial of a speedy trial. *Hodges v. State*, 48 Ala. App. 217, 263 So.2d 518 (1972).

The Petitioner did not make a *prima facie* case for release on grounds of the denial of a speedy trial and has not even alleged that any actual prejudice resulted from the fact that trial was delayed. *Sellers v. State*, 48 Ala. App. 178, 263 So. 2d 156 (1972).

A Defendant who makes no outcry when there was a delay in his trial is deemed to have waived his right to a speedy trial. *Autrey v. State*, 44 Ala. App. 53, 202 So.2d 88, cert. denied, 88 S.Ct. 1422, 390 U.S. 1030, 20 L.Ed. 2d 287 (1967); *Broadnax v. State*, 54 Ala. App. 546, 310 So.2d 265 (1975).

It is fundamental that an accused must affirmatively exercise his right to a speedy trial. *Mayberry v. State*, 51 Ala. App. 343, 285 So.2d 507, cert. denied, 291 Ala. 792, 285 So.2d 512, cert. denied, 94 S.Ct. 1438, 415 U.S. 929, 39 L.Ed.2d 486 (1972). Since there was no effort on the part of the Petitioner to secure his right to a speedy trial prior to the day of trial, he may not complain of any delay on appeal. *Harmon v. State*, 48 Ala. App. 521, 266 So.2d 325, cert. denied, 289 Ala. 744, 266 So.2d 328 (1972); *Moulden v. State*, 47 Ala. App. 573, 258 So.2d 915 (1972).

Petitioner Tidmore's failure to make an express demand for immediate trial did not entitle him to complain later about any delays. *Scott v. State*, 227 So.2d 436, 45 Ala. App. 149.

Where neither accused nor anyone on his behalf made request for speedy trial, accused was not entitled to discharge on ground of delay. *Washington v. State*, 277 So.2d 805, 45 Ala. App. 173.

The Petitioner was *not* denied an impartial jury trial. (Emphasis added) He alleges that the Court's failure to excuse four (4) jurors for cause resulted in denying him the effective use of his peremptory challenges.

On voir dire examination of the jury panel, defense counsel asked the following question:

> "If during the course of the trial of this case the evidence shows that Tom Tidmore showed or caused to be shown

> in the City of Birmingham a movie which depicted acts of sexual intercourse including cunnilingus, fellatio, homosexuality and bisexuality, would you merely because of that be prejudiced against him?" (M. p. 23)

Five (5) jurors responded: Mr. Crabtree, Mr. Parker, Mrs. McLaughlin, Mrs. Keith and Mrs. Grace. The trial judge then instructed the jury on its duties, responsibilities and that the jury must decide whether or not the film was obscene based on certain criteria under the law and upon which the jury would be instructed.

Juror Grace then responded that she could be guided by the law, as did Jurors Keith and Crabtree. (M. p. 27) Juror McLaughlin was excused by the court. (M. p. 28) Subsequently defense counsel requested that Jurors Crabtree, Grace, Keith, and Parker be excused for cause. The court then overruled this request with the following comment.

> "My recollection of when I explained to them, namely the charge and the fact that not their personal evaluation is involved, and as we all know, it is contemporary community standards. I think each of them individually answered they would base it on the law in the case and the evidence in the case so I am going to overrule it." (M. p. 36)

The City then asked a few questions of the jurors whereupon the trial court, in an abundance of caution, again inquired of the jurors:

> "I think I am going to ask a question to make sure I understand correctly. I think I do but to make sure, Mrs. Grace, Mrs. Keith, Mr. Parker, Mr. Crabtree, this may be a duplication but I want to make sure that I am correct.
>
> "In answer to the question that you would be prejudiced—would anyone be prejudiced against the defendant

because they showed a certain picture with certain acts, then I explained the law and what the proof had to be and particularly I have emphasized that you must be guided by the law and I want you all to be very candid about it, that is really what we are here for, and we want to make very sure everyone is as impartial as is humanly possible for people to be, realizing we are all people. Are you sure, Mrs. Grace, you wouldn't be—understanding the law and seeing this picture, do you—are you sure that you would not be prejudiced against the defendant but would base it solely on the——

"The Juror: Right, after your explanation.

"The Court: Mrs. Keith?

"The Juror: I could do it, with the law. I could do it.

"The Court: Mr. Parker?

"The Juror: Applying the federal law to it?

"The Court: Yes, it is really Alabama law, too. I used the United States Supreme Court because that is where over the years case after case has come out of, but this is Alabama law, in fact, right now as far as I know. It changes frequently.

Mr. Crabtree?

"The Juror: Yes, sir, I think I could.

"The Court: All right, I will overrule the motion again." (M. pages 37 & 38)

The action of the trial court in overruling the motion to excuse the jurors for cause was proper. The principles of law involved are clear and are concisely set forth under 50 C.J.S. 998-999, Juries, § 242.

"A juror is incompetent who has such personal opinions with respect to the subject matter of the suit, or con-

scientious scruples on any subject, as would influence his verdict, . . ., or who has a fixed opinion as to any of the main issued involved.

• • •

"In general the same test which determines whether a juror's opinions as to the guilt or innocence of accused disqualifies him, . . ., is applied to determine whether a juror's scruples will disqualify him; that is, can he eliminate the influence of his scruples and render a verdict according to the evidence? Ordinarily he is not disqualified where it appears that he is entirely willing to accept the law as laid down by the court and able to decide the case impartially according to the evidence. The determination of this question is based on the juror's answers and demeanor and is within the sound discretion of the trial judge."

Thus, where jurors testify that they have opinions but that they would try the case fairly and impartially according to the law and the evidence, and that their opinions would not reflect their verdict, those jurors are competent to serve. *Godau v. State*, 179 Ala. 27, 60 So. 908 (1913); *Strickland v. State*, 151 Ala. 31, 44 So. 90 (1907); *Huddleston v. State*, 37 Ala. App. 57, 64 So.2d 90, cert. denied, 258 Ala. 579, 64 So.2d 102 (1953). Petitioner cites *Wilson v. State*, 243 Ala. 1, 8 So.2d 422 (1942 case). It stands for the general principle that in criminal cases the defendant is entitled to a fair trial by an impartial jury. The facts in that case have no resemblance to the case at bar and further *Wilson* involved an alleged homicide.

Leach v. State, 31 Ala. App. 390, 18 So.2d 285 (1944 case), cited by the Petitioner is inapplicable to the case at bar because there one (1) juror did *not* answer a question on voir dire examination and thereby failed to disclose that he had

served as Deputy Sheriff for fifteen (15) years and such concealment warranted a new trial. *In the case at bar no failure to disclose is involved.* (Emphasis added)

To disqualify a prospective juror, he must have more than a bias, or fixed opinion, as to the guilt or innocence of the accused. Such opinion must be so fixed as that it would bias the verdict a juror would be required to render. *McCorvey v. State*, Ala. Cr. App., 339 So.2d 1053, cert. denied, 339 So.2d 1058 (1976); *Hammil v. State*, 90 Ala. 37 (1890).

The trial court did *not* err in refusing to excuse for cause particular jurors. (Emphasis added)

Procedure in which jurors who, when asked if they had fixed opinions, had given equivocal answers, were further interrogated and found to have been able to conscientiously lay aside their predilections and go by the evidence. *Mathis v. State*, 296 So.2d 760, 52 Ala. App. 674.

The law is well settled that a defendant has *no* constitutional right to a trial by any particular jury or jurors, but has the right to trial by a competent and impartial jury. (Emphasis added) 42 Am. Jr. 2d at 647.

A juror, though having previously expressed opinion regarding a defendant's guilt, is *not* disqualified if he states unqualifiedly that, as a juror, he can find a true verdict on the evidence alone. (Emphasis added) *Hawkins v. State*, 29 Ala. App. 221, 195 So. 762; *Peterson v. State*, 227 Ala. App. 361, 150 So. 156; *Thomas v. State*, 150 Ala. App. 31, 43 So. 371; *Ragsdale v. State*, 134 Ala. App. 24, 32 So. 674; *Jackson v. State*, 77 Ala. App. 18; *Willingham v. State*, 262 Ala. 550, 80 So. 2d 280.

Trial judge's inference from voir dire that prospective juror was not subject to challenge for favor or bias was not erroneous.

Section 12-16-150, Code of Alabama 1975;
Felton v. State, 246 So.2d 467, 46 Ala. App. 579.

The trial judge's actions are presumptively correct, in the absence of a showing to the contrary.

Ballard v. State, 236 Ala. 541, 184 So. 260.

It was not error for the Court to inquire of the veniremen if they or any of them had a fixed opinion as to the guilt or innocence of the accused. Indeed, it was his duty to do so. If the manner in which the court conducted such inquiry resulted in prejudicial error to the accused, it is his duty to show such error. It cannot be presumed.

Kabase v. State, 31 Ala. App. 77, 12 So.2d 758, cert. denied 244 Ala. 182, 12 So.2d 766;
Fuller v. State, 118 So.2d 153;
Section 12-16-6, Code of Alabama 1975;
Section 12-16-150, Code of Alabama 1975;
Constitution of Alabama 1901, Section 6.

Statute giving a party the right to examine jurors as to their qualifications, interests or bias does not in any way diminish trial court's discretion in such matters.

Finley v. State, 295 So.2d 428, 292 Ala. 424;
Code of Alabama 1940, Title 30, Section 52.

Ruling of trial court as to bias or prejudice of a juror is largely discretionary.

Clendon v. Yarbrough, 171 So. 277, 233 Ala. 269.

The following omissions appear in Petitioner's Brief and Argument:

(a) Page six (6), paragraph two (2) he omitted the following words from the Court's charge, *and look at the evidence, and hear the evidence* (M. p. 26). (Emphasis added)

(b) Page eight (8), ninth (9) paragraph, next to last line, number omitted after *Appendix No.* (Emphasis added).

(c) Pages A8-A10. On page A8 the word *felony* remains, it was stricken through on the original search warrant. Please see (T. page 105). Page A9, a portion of the next to last sentence in the affidavit was incorrectly quoted, it was stated "of female actors", actually it was "*of a female actor*" (T. p. 105). (Emphasis added)

Further, the magistrate signed his name which was omitted, it was *R. Larry Morris* (T. p. 105). (Emphasis added)

The search warrant was also signed by the magistrate, his name being omitted again, *R. Larry Morris* (T. p. 105). (Emphasis added)

None of the alleged violations of Thomas Tidmore's Constitutional rights are supported by the record. (Emphasis added)

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be denied to review the opinion and judgment of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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